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Office of Administrative Law Judges
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Issue Date: 29 June 2005

In the Matter of:

THOMAS MAGGARD,
Claimant,

v. **Case No.: 2003-BLA-06482**

**BLEDSOE DEEP MINING COMPANY/
KENTUCKY COAL PRODUCERS
SELF INSURANCE FUND,**
Employer/Carrier, and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**
Party-in-Interest.

Appearances:

Monica Rice Smith, Esq., Edmond Collett, PSC, Hyden, KY
For Claimant

David H. Neeley, Esq., Neeley & Reynolds, PSC, Prestonsburg, KY
For Employer/Carrier

Neil Murholt, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, TN
For Director

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Thomas Maggard ("Claimant") on December 4, 2001. There were no previous claims filed. The putative responsible operator is Bledsoe Deep Mining Company ("Employer") which is self insured through the Kentucky Coal Producers Self Insurance Fund ("Carrier").

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim,[1] as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001. 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003, solely for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

The instant claim was filed on December 4, 2001. (DX 2).[3] Claimant was examined for the Department of Labor by Glen Baker, M.D. on January 11, 2002. (DX 8). Employer Bledsoe Deep Mining Company and Carrier Kentucky Coal Producers Self-Insurance Fund were provided with a Notice of Claim dated January 9, 2002. (DX 12). Employer/Carrier controverted the claim on February 1, 2002 and on March 20, 2002, inter alia, because Claimant did not work for the Employer for a cumulative period of one year. (DX 13). On October 29, 2002, the District Director issued a Schedule for the Submission of Additional Evidence, which stated that Claimant would not be entitled to benefits if a decision were issued at that time and that the named coal mine operator ("Bledsoe Deep Mining Company") was the responsible operator. (DX 14). A Proposed Decision and Order, Denial of Benefits (issued by the District Director on May 20, 2003) determined that the Claimant was not entitled to benefits because the evidence did not show that the Claimant had pneumoconiosis, that the disease was caused at least in part by his coal mine work, or that the disease had caused a breathing impairment of sufficient degree to establish total disability under the Act and regulations. (DX 30). The District Director also found that Claimant worked as a coal miner for "3 years, from 1967 to December 31, 1982." *Id.* The responsible operator was again identified as "Bledsoe Deep Mining Company." *Id.* Claimant, through counsel, requested a hearing and the case was transferred to the Office of Administrative Law Judges for a hearing on August 12, 2003. (DX 21).

A hearing in the above-captioned matter was held on April 29, 2004 in London, Kentucky. All parties, including the Director, submitted Designation of Evidence/BLBA Evidence Summary Forms. The Claimant was the only witness to testify. At the hearing, Director's Exhibits 1 through 21 ("DX 1" through "DX 21") and Employer's Exhibit 1 ("EX 1") were admitted into evidence. The record closed at the end of the hearing but the parties were allowed sixty days to submit briefs or written closing arguments, which period could be extended

[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[3] Director's Exhibits 1 through 21, admitted into evidence at the April 29, 2004 hearing, will be referenced as "DX" followed by the exhibit number and the hearing transcript will be referenced as "Tr." followed by the page number.

by stipulation. The Brief on Behalf of the Employer was filed on June 18, 2004; a Position Statement in Support of Claimant's Claim for Benefits was filed on June 22, 2004; and the Director's Post-Trial Brief (submitted under cover letter of June 25, 2004) was filed on July 6, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

At the hearing, Employer withdrew the issue of "Miner" and the parties stipulated to "at least 3" years of coal mine employment, the amount found by the Director. (Tr. 7). However, I find length of coal mine employment was incorrectly omitted as an issue on the CM-1025 Transmittal form, as Claimant's counsel advised in the appeal letter of May 27, 2003 that "[t]he claimant disagrees with the Director's determination of length of coal mine employment" (DX 17). Accordingly, the list of issues is amended to include length of coal mine employment beyond three years. **SO ORDERED.**

The issues before me are existence of pneumoconiosis, its casual relationship with coal mine employment, total disability, causation of total disability, responsible operator, and length of coal mine employment beyond three years (DX 21, Tr. 7).

Medical Evidence

Interpretations of chest X-rays taken on January 11, 2002, and June 23, 2003, all of which utilize the ILO system and are in compliance with the regulatory standards, are summarized below.

Exhibit No./ Party designating	**Date of X-ray/ Reading**	**Physician/ Qualifications**[4]	**Interpretation**
DX 8 DOL Exam	**01/11/2002** same	G. Baker BCP	Pneumoconiosis 0/1,[5] p/p, 3 zones (upper right, middle). Quality 2. Underexposed.
DX 8 DOL Exam [Quality reading]	01/11/2002 02/22/2002	E.N. Sargent BCR, B-reader	Quality 2. Underexposed. [Quality Reading Only]. "Smoking history??"
DX 9 Employer Rebuttal to DOL Exam.	01/11/2002 05/24/2002	D. Halbert B-reader, BCR	Completely negative. Quality 2. Light.
EX 1 Employer Initial	**06/23/2003** same	A. Dahhan B-reader, BCP	Negative for pneumoconiosis. Illegible comments. Quality 1. Narrative report states "post mediastinotomy changes."

[4] BCR refers to a board certified radiologist and BCP refers to a physician who is board certified in internal medicine with the subspecialty of pulmonary diseases. A B-reader is a physician certified by NIOSH to read x-rays.
[5] A reading of 0/1 does not qualify as evidence of pneumoconiosis under the regulations. 20 C.F.R. §718.102(b).

Pulmonary function tests taken on January 11, 2002 (DX 8) (DOL Baker examination) and June 23, 2003 (EX 1) (Dahhan Examination, Employer Initial Evidence), which were of questionable validity, produced the following results, pre- and post-bronchodilator:

Exhibit No.	Date/ Physician	Age/Height	FEV1	FVC	MVV	FEV1/FVC
DX 8	01/11/2002 V. Simpao	52 70 inches	1.92 (pre)	3.17 (pre)	Not done	82% (pre)
EX 1	06/23/2003 A. Dahhan	53 175 cm. (68½ inch.)	1.75 (pre) 1.97 (post)	2.33 (pre) 4.07 (post)	23 (pre) 22 (post)	75% (pre) 49% (post)

Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. Under these criteria, the January 11, 2002 test did not produce qualifying values, although the FEV1 was qualifying, while the June 23, 2003 test produced qualifying values based upon the FEV1 and MVV, and based upon the FEV1/FVC ratio post bronchodilator.

The validity of the pulmonary function tests was questioned by Dr. Baker and Dr. Dahhan. Dr. Baker noted the following comments with respect to the January 11, 2002 pulmonary function test:

> Test terminated due to patient having chest pain and using Nitroglycerin. Constantly complaining of needing "fresh air." No valid tracings due to poor effort.

(DX 8). He noted that the test showed "moderate obstructive defect, ? effort." *Id.* Although there were tracings, the absence of "valid tracings" may make this test invalid under the regulations.[6] 20 C.F.R. §718.103.

With respect to the June 23, 2003 test, Dr. Dahhan commented:

> Spirometry was invalid due to poor effort as demonstrated by excessive hesitation, lack of plateau formation and inconsistent effort. The study was repeated after the administration of bronchodilators resulting in another invalid study. . .

(EX 1).

Arterial blood gases were taken at rest on January 11, 2002 (DOL Baker examination) (DX 8) and June 23, 2003 (Dahhan examination, Employer Initial Evidence) (EX 1). No

[6] It is unclear why the test was not repeated; however, it may have been contraindicated by the Claimant's cardiac symptomatology.

exercise testing was conducted on January 11, 2002 due to the Claimant's ischemic heart disease. However, the Claimant was exercised for two minutes by Dr. Dahhan; the exercise was terminated due to ankle pain. The ABGs produced the following values, which were not qualifying under Part 718, Appendix C:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 8	01/11/2002	G. Baker	39 (rest)	79 (rest)	No
EX 1	06/23/2003	A. Dahhan	37.1 (rest) 31.4 (exercise)	81 (rest) 96 (exercise)	No No

Medical opinions were rendered by two physicians:

(1) Dr. Glen Baker conducted the January 11, 2002 Department of Labor examination of the Claimant (DOL examination) (DX 8). In a DOL form report (which provided detailed findings concerning the Claimant's history, physical findings, and test results), Dr. Baker listed the following diagnoses and bases for the diagnoses:

1. COPD with moderate obstructive defect: PFTS [pulmonary function tests]
2. Chronic bronchitis: history of cough, sputum production and wheezing
3. Hypoxemia: PO_2
4. Ischemic heart disease: S/P AMI [status post acute myocardial infarction]

Id. With respect to the etiology of these conditions, Dr. Baker stated "cigarette smoking/coal dust exposure" for conditions 1 through 3 and "ASHD" [arteriosclerotic heart disease] for condition 4. *Id.* In a supplemental form, when asked whether the miner had an occupational lung disease which was caused by his coal mine employment, he checked the box for "NO." However, when asked about the etiology of the pulmonary impairment, he listed cigarette smoking and coal dust exposure without further explanation. He characterized the Claimant's pulmonary impairment as "Moderate Impairment" (although noting questionable effort on the pulmonary function tests) and stated that Claimant lacked the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment (but, again, he questioned the effort on the pulmonary function tests.) (DX 8).

(2) Dr. Abdul Dahhan examined the Claimant for the Employer on June 23, 2003 (Employer's Initial Evidence) (EX 1). His report of June 27, 2003, related to the examination he conducted on June 23, 2003, and included a history, physical findings on examination, a review of test results, and conclusions. In that report, Dr. Dahhan stated that there were insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis. He also found no evidence of pulmonary impairment and/or disability caused by, related to, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. However, due to the poor performance on spirometry testing, Dr. Dahhan was unable to rule out an obstructive ventilatory defect. (EX 1).

Background and Employment History

Claimant was the only witness to testify at the hearing. He indicated that he was born in October 1949 and was not currently married. (Tr. 8). Claimant is divorced from his former wife (Sarah Caldwell), and his children are no longer dependent on him. (Tr. 8-9).

Claimant testified that his first coal mine employment was in October 1967, when he was employed at "Debbie 2" as a coal loader, working underground. (Tr. 9-10). He does not recall who owned that mine. (Tr. 9). He left Debbie (Deby)[7] Coal in December 1967 when he joined the military. (Tr. 10). However, in January 1968, he came back and started working at "Debbie 4," at another mine across the hill, also loading coal, until they shut down, six weeks later. (Tr. 10). When he worked at Debbie 2 and Debbie 4, he was paid something like 25 cents or 50 cents per ton, and most of the time he was paid in cash. (Tr. 10). After Debbie 4, he went to work for Shamrock Coal Company, also in 1968, working underground as a roof bolter. (Tr. 10-11). He worked there for most of the year, but "the top got so bad" he had to leave; the miners and the machinery were covered in rocks every single day and someone was getting hurt almost every day. (Tr. 11). At Shamrock, he was paid by check but Claimant testified that when he tried to pay his income tax, he was told that no taxes had been withheld and paid in, and he did not recall receiving a W-2 form. (Tr. 11-12). On cross examination, however, he stated that he thought that Social Security withholdings were made, but he could not remember. (Tr. 26).

After leaving Shamrock in 1968, he went to Indiana and did not return to coal mining until the middle of September or the first of October, 1971, when he started working for the Hub Coal Company. (Tr. 12). He left Hub in January 1972 and went to work for Blue Diamond in Leatherwood, where he worked until December 1972. (Tr. 12-13). Both jobs were underground. (Tr. 12). At Hub, he sawed timbers, shoveled, ran a scoop, and did a little bit of everything. (Tr. 12-13). Hub paid him $3 per hour. (Tr. 12-13). In December 1972, he left Blue Diamond for about a month, returning to work in 1973; he could not recall how long he was employed by Blue Diamond in 1973. (Tr. 13). At Blue Diamond, he drilled and shot coal; most of the work he did was shooting coal. (Tr. 13-14). He was paid $4 per hour when he worked at Blue Diamond, and he worked 40 to 48 hours per week. (Tr. 14). In 1973, he was laid off and he went to New England, returning in 1974, when he started working for Arthur Napier's, which may be the same as A & G Coal Company. (Tr. 14-15). He worked there for two or three months until it shut down and he went to the saw mill for about two months. (Tr. 15). After the saw mill, he started working for Leeco, also in 1974. (Tr. 15). He worked for Leeco starting in about August or September 1974 until May 1975, when he got hurt. (Tr. 15-16). At Leeco, which was also underground mining, he set jacks at the face of the coal and ran the continuous miner. (Tr. 16). On cross examination, Claimant testified that there were no Social Security withholdings at Napier's and A.J. Morse, where he was paid in cash. (Tr. 26).

In May 1975, when he was employed by Leeco, he had an accident in which he pinched a nerve in his neck, had the blood to his arm blocked, and ruptured two discs in his back. (Tr. 16-17). He was out of work for three years. (Tr. 16). He received a worker's compensation award based upon that injury. (Tr. 18).

[7] The Social Security records list employment with "Deby Coal Company" in 1968. (DX 6).

In 1979, Claimant returned to work as a security guard, working around the mines for 95% of the time, and he was so employed until he started as Bledsoe in 1982. (Tr. 17). His work as a security guard was mostly performed around the tipple where they were loading trains, in a very dusty area, and some of his work was in the deep mines. (Tr. 17). He worked for a security group that provided services for two or three different companies. (Tr. 17).

In approximately January 1982, Claimant returned to actual coal mine work, and he was employed by Bledsoe Deep Mining. (Tr. 17-18, 27). At Bledsoe, he worked underground, drilling and shooting coal. (Tr. 18-19). He was paid approximately $11 per hour and he worked at least 40 hours per week, sometimes more. (Tr. 19, 26). He would work an extra shift once or twice a month. (Tr. 27). When he worked at Bledsoe, Social Security was withheld from his checks. (Tr. 26). To the best of his recollection, he was injured in December 1982, when he reinjured his back and arm. (Tr. 18). When he got to the hospital, he was told that he was fired. (Tr. 18). He filed for worker's compensation against Bledsoe so that they would pay his doctor's bills, but he did not receive an award. (Tr. 18). On cross examination, Claimant estimated that he worked for Bledsoe underground for about eleven months, and at least ten months. (Tr. 28).

On cross examination, Claimant indicated that he worked at Security Experts in 1982, after he left Bledsoe. (Tr. 27.) He denied any knowledge of working for Glencoe Miners, Inc. in 1982, unless it was related to Kentucky Print, where he worked for a month after being laid off by Bledsoe. (Tr. 28). After leaving Glencoe he went to the hospital. (Tr. 28-29).

When he left the hospital in 1983, he started driving a tractor-trailer for Mountain Ready-Mix [mistranscribed as "Redimix."] (Tr. 19; 29-30). He hauled coal, sand, and cement; they would "haul coal out and bring the other back." (Tr. 19). He actually started working in 1984 but he was not on the payroll until 1985. (Tr. 19). He left in October 1985 to take care of a young one for about three months, until he was able to get someone to watch the children. (Tr. 20). He worked for Ready-Mix sporadically in 1986 and in 1987 until he stopped working for good, in 1987. (Tr. 20). The Social Security records reflect Claimant's employment with Mountain Ready-Mix, Inc. in 1985, 1986, and 1987. (DX 6). At Ready-Mix, he hauled the coal up north and brought concrete, sand, or gravel back. (Tr. 20). He was picking the coal up from four or five different coal companies in Hazard, and he would load it at the tipple and haul it from there. (Tr. 20-21). He would have to sit at the tipple while they were grinding it and trucking it up; "half the time you couldn't see fifteen foot in front of you because of the dust." (Tr. 21). He would haul the coal to Cincinnati, Kentucky or Louisville, to power plants. (Tr. 21). There were thirty or forty trucks waiting to be loaded, and sometimes he would have to wait four or five hours before his truck would get loaded. (Tr. 21). Most of his work involved taking coal from the tipple to whoever it was sold to, but he would haul a few loads from the strip mines to a tipple. (Tr. 21). When he hauled coal, he was paid by the load. (Tr. 30). Most of the time he would work five or six days per week. (Tr. 30).

Based upon Claimant's testimony, he had approximately four years of coal mine employment between 1967 and 1975, and another year in 1982, for a total of five years of coal mine employment, not counting his employment as a security guard and driving a truck for Mountain Ready-Mix. Adding those additional periods, Claimant was exposed to coal mine dust

for a period of approximately ten years. Claimant's length of qualifying coal mine employment is discussed further below.

Claimant explained that his medical problems consist of back trouble, heart trouble, and lung trouble. (Tr. 22). Every one of his heart doctors when he had a heart attack suggested he had black lung. (Tr. 22). His symptoms include lack of wind, smothering, and coughing up what looks like coal dust. (Tr. 22). He coughs every two or three days, and his condition is aggravated when the humidity gets high. (Tr. 22). Currently, he is on a breathing pill, but he does not take it much because he cannot afford it. (Tr. 22). The pill was prescribed by Dr. Vargeis, his family doctor, because his heart doctor told him to prescribe it in a letter. (Tr. 22-23). He has also seen a lung doctor in Hazard, Dr. Wicker, who started treating him for his heart. (Tr. 23). Claimant has had six heart attacks and open heart surgery. (Tr. 23). Dr. Vargeis also treats Claimant for his old back injury (from 1975) and he is on medicine, including flexeril, a muscle relaxer, and darvocet for pain. (Tr. 23-34). It does not bother him too much if he takes the medicine. (Tr. 25). He also prescribed an inhaler but Claimant cannot afford it. (Tr. 24). He also takes blood pressure medicine and aspirin. (Tr. 24).

Claimant's activities are affected by his breathing. (Tr. 24). He cannot walk stairs at all and can hardly make it up two stories. (Tr. 24-25). If it is not too cold, he can go fishing, but he has difficulty with a steep 15-foot bank, because of his breathing. (Tr. 25).

On cross examination, Claimant admitted to smoking cigarettes from approximately age 15 or 16 (in 1964 or 1965) and continuing. (Tr. 31-32). Claimant stated that he previously smoked an average of one pack per day, and occasionally two packs per day, but that he had been down to a third pack per day for the past three and one half to four years (since approximately 2000). (Tr. 31). That testimony was consistent with Dr. Dahhan's statement in his June 2003 report that the Claimant "is a smoker beginning at the age of 15 and averaged a pack per day before reducing it three years ago to 1/3 pack per day." (EX 1). In January 2002, Dr. Baker recorded a smoking history of one pack per day starting at age 16. (DX 8). Claimant explained that although he smoked between one and two packs of cigarettes per day, he hardly ever smoked two packs per day, and in around 1974 or 1975 (when he was 25 or 26 years old) he started smoking one pack per day. (Tr. 32). Based upon the above, I find that 35 pack years is a conservative estimate.

Discussion and Analysis

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 23 B.L.R. 1-47 (2004) (en banc), BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no

more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; s*ee* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence from prior federal black lung claims. *Dempsey* at 5.

In this case, the parties have complied with the evidentiary limitations.

Length of Coal Mine Employment

As noted above, Claimant discussed his coal mine employment extensively at the hearing, and I find that the Director's finding of three years of coal mine employment did not adequately account for all of Claimant's qualifying employment. Based upon Claimant's testimony, he had approximately four years of coal mine employment between 1967 and 1975, and another year in 1982, for a total of five years of coal mine employment. Claimant also alleged two periods of employment in and around mines, as a security guard and as a truck driver, which I find not to constitute coal mine employment.

The term miner or coal miner is defined as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal" and "also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment." 20 C.F.R. §725.101(a)(19). Under the regulations, self-employed individuals and independent contractors who otherwise meet the requirements are included within the definition of "miner." 20 C.F.R. §725.202(c). In the amended regulations, there is a rebuttable presumption that an individual who is employed in or around a coal mine or coal preparation facility is a miner; the presumption may be rebutted either by a showing that the worker was not engaged in the extraction, preparation or transportation of coal while working at the mine site (or maintenance or construction of the mine site) or by showing that the worker was not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(a). The general provision is governed by the Board's three prong test, set forth in *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). *Whisman* requires proof that (1) the coal was still in the course of being processed and was not yet a finished product in the stream of commerce (status); (2) the worker performed a function integral to the coal production process, i.e., extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (function); and (3) the work that was performed, occurred in or around a coal mine or coal preparation facility (situs). Some circuit courts have held that the status prong is subsumed in the function prong and have therefore only set forth a two part, function and situs test.

First, Claimant was employed as a security guard working with a security group that covered two or three different companies for three years between 1979 and 1982. Most of his work (95%) was performed around the mines, including deep mines but mostly around the tipple, where they were loading trains. This employment does not qualify because the Claimant was not involved in the extraction of coal and does not satisfy the function prong. *See Falcon Coal Co. v. Clemons,* 873 F.2d 916 (6th Cir. 1989) (night watchman or security guard does not qualify as a miner). *See also Slone v. Director, OWCP,* 12 B.L.R. 1-92 (Ben. Rev. Bd. 1988). Thus, the presumption of coverage under the definition of miner is rebutted.

Second, Claimant drove a truck for Mountain Ready-Mix sporadically beginning in 1984 and ending in 1987. Claimant testified that most of the coal hauling that he performed involved taking coal from the tipple to power plants, although from time to time he would also haul coal from the strip mines to a tipple. (Tr. 21). It is well established that the transportation of coal from a tipple or processing plant to an end user is not coal mine employment, as the coal is already in the stream of commerce. *See, e.g., Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984) (unloading prepared coal from railroad cars to trucks or storage piles and delivery of coal to consumers is not coal mine employment). However, time spent delivering empty coal cars and cars containing raw coal to coal preparation facilities has been held to be integral to the coal preparation process. *See Norfolk & Western Railway Co. v. Director, OWCP [Shrader]*, 5 F.3d 777 (4th Cir. 1993); *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144 (4th Cir. 1990), *cert. denied,* 500 U.S. 916 (1991). Thus, a small portion of Claimant's employment with Mountain Ready-Mix may qualify as coal mine employment. Claimant did not quantify the period of time spent hauling raw coal from the surface mines to the tipple but he did state that out of all the loads he hauled, "[p]robably ten or fifteen loads [came] from strip jobs and all the

rest of it come from [a] tipple." (Tr. 21). Thus, only a minimal amount of time was spent by Claimant hauling raw coal to be processed. Thus, I do not find a basis for crediting Claimant with additional coal mine employment based upon his employment with Ready-Mix.

Responsible Operator

The Director has named the Employer, Bledsoe Deep Mining Company, as the responsible operator based upon Claimant's employment with that entity in 1982. Employer disputes that Claimant was employed for it for a cumulative period of one year and also argues that Mountain Ready-Mix, which subsequently employed Claimant, should be named as the responsible operator. I agree with Employer that it was not properly named as responsible operator but disagree that Mountain Ready-Mix may be so named.

The putative responsible operator in a claim for black lung benefits is the entity "with which the miner had the most recent periods of cumulative employment of not less than 1 year. . . ." 20 C.F.R. § 725.493(a)(1) (2000). Section 725.493 requires a two-step inquiry. *Armco, Inc. v. Martin*, 277 F.3d 468 (4th Cir. 2002). First, it must be shown that a claimant worked for the coal mine operator for one whole year, or partial periods totaling one year. *Id.* at 474. Second, it must be shown that the miner worked regularly, as defined by section 725.493(b), for a minimum of 125 days. *Id.* In meeting the one-year threshold, it is not necessary that the coal mine operator employ a miner for twelve consecutive months, as intermittent periods of employment may be added together. 20 C.F.R. § 725.492(c). In the event that a miner's employment history reveals multiple employers in the coal industry, the entity that most recently employed miner for "not less than 1 year" shall be considered the putative operator. 20 C.F.R. § 725.493(a)(4). Finally, the regulations state that the beginning and ending dates of employment with each coal mine operator should be identified "to the extent the evidence permits." 20 C.F.R. § 725.493(b).

I find that the evidence does not establish the threshold requirement of employment by Employer for one year. In this regard, Claimant testified to the best of his recollection that he started working for the Employer in January 1982 and stopped working there in December, when he was hospitalized following an injury. That does not amount to a full year. Further, there is no other evidence establishing that Claimant was employed by the Employer for a full year. The Social Security records only show that Claimant was employed by Employer during calendar year 1982. Moreover, Claimant denies that he received worker's compensation or other benefits from Employer during his hospitalization at the end of 1982 and in 1983.

While the issue need not be resolved, I agree with the Director that Claimant's subsequent employment with Mountain Ready-Mix does not make that entity a coal mine employer. As I have discussed above, while that employment extended over more than one calendar year, it only involved a minimal amount of employment that would fit the definition of coal mine employment. Such employment is insufficient for Mountain Ready-Mix to be deemed a coal mine employer. Moreover, even if Mountain Ready-Mix could be characterized as a coal mine employer, there has been no showing that the ten to fifteen loads that Claimant took from the surface mines to tipples amounted to 125 days of coal mine employment.

In view of the above, Employer Bledsoe Deep Mining will be dismissed as a party to this action.

Merits of the Claim

To prevail in a claim for Black Lung benefits, a claimant miner must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis

The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting x-ray reports; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 (or two other presumptions set forth in §718.305 and §718.306); or (4) a determination of the existence of pneumoconiosis as defined in §718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a) (1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests and procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. At least one United States Court of Appeals (the Fourth Circuit) has held that all of the evidence from section 718.202 should be weighed together in determining whether a miner suffers from pneumoconiosis. *See, e.g., Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-209 (4th Cir. 2000). *But see Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc) (noting "the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis.")

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986).

In the recent amendments to the regulations, the definition of pneumoconiosis in section 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconiosis, such as coal

worker's pneumoconiosis or silicosis. Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a). The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

X-Ray Evidence. The x-ray evidence submitted in connection with the instant case is summarized above. Of three x-ray readings of two x-rays, none are positive for pneumoconiosis. Although Dr. Baker noted some opacities consistent with pneumoconiosis on his reading of the January 11, 2002 x-ray, he found them to be of "0/1" profusion, which does not qualify as evidence of pneumoconiosis under the regulations. 20 C.F.R. §718.102(b). Claimant has therefore failed to establish pneumoconiosis based upon the x-ray evidence, and Claimant cannot prevail under 20 C.F.R. §718.202(a)(1).

Autopsy or Biopsy Evidence. There is no pathological evidence of record. I therefore find that the Claimant has not established that he suffers from pneumoconiosis under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A claimant can also demonstrate pneumoconiosis presumptively under section 718.202(a)(3). A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. There is no evidence of complicated pneumoconiosis, so the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306, are also inapplicable, inter alia, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 only applies to deceased miners. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. In addition to the x-ray readings (discussed above), the medical opinions of two doctors (Dr. Baker, who conducted the DOL examination, and Dr. Dahhan, who examined the Claimant for Employer) addressed the issue of whether the Claimant suffers from pneumoconiosis. The opinions of these physicians are summarized above.

There is no basis for a finding of clinical pneumoconiosis under the regulations. In this regard, the chest x-rays were either negative or 0/1, and neither physician has opined that the Claimant has "coal worker's pneumoconiosis" or clinical pneumoconiosis.

On the issue of legal pneumoconiosis, Dr. Baker's opinion is equivocal. In this regard, Dr. Baker has diagnosed several conditions (COPD, chronic bronchitis, and hypoxemia) that he has attributed to both cigarette smoking and coal dust exposure. However, while Dr. Baker has articulated the basis for these diagnoses (specifically, the pulmonary function testing; history of cough, sputum production, and wheezing; and oxygenation on arterial blood gases), he has not stated a reason for attributing those diagnoses in part to coal mine dust as an etiological agent. Coal dust exposure alone is an insufficient articulated basis for a diagnosis of pneumoconiosis.

See, e.g., Milburn Colliery Co. v. Hicks, 138 F.3d 524, 21 B.L.R. 2-323 (4th Cir. 1998). Further, Claimant has failed to establish that any of these chronic diseases or impairments is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment" as now required by the regulations, as amended. Furthermore, when asked in the supplemental form:

> Based upon your examination, does the miner have an occupational lung disease which was caused by his coal mine employment?

Dr. Baker checked the box for "NO." (DX 8). This response on the supplemental form, coupled with the original form report, suggests that Dr. Baker discounted any possible contribution by coal dust as trivial.

Dr. Dahhan, who is board certified in internal medicine and the subspecialty of pulmonary diseases, admitted that his efforts to assess whether the Claimant had an obstructive ventilatory defect were hampered by the Claimant's poor performance on pulmonary function testing. However, he noted that the other evidence did not suggest pulmonary impairment and/or disability. Based upon a review of all of the available evidence, he determined that there was no evidence of a pulmonary impairment or disability in any way caused or aggravated by coal dust exposure.

As a whole, I find that the preponderance of the medical opinion evidence does not support a finding of clinical or legal pneumoconiosis. In reviewing the reports of these two physicians, I find Dr. Dahhan's report to be better reasoned and documented. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (BRB 1987) (explaining that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions). Dr. Baker has done little to explain the apparent inconsistency in his report and he expressed his own reservations as to the validity of the pulmonary function test findings. Dr. Dahhan has pointed to the lack of evidence supporting a finding of disability or providing a basis for attributing that disability to coal mine dust exposure. It is the Claimant's burden of proof and he had not met that burden with Dr. Baker's equivocal, unreasoned opinion.

Other Evidence of Pneumoconiosis. There is no other evidence on the issue of pneumoconiosis.

All Evidence on Pneumoconiosis. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis, including the essentially negative chest x-ray evidence and the reasoned medical opinion evidence, I find that the Claimant has failed to establish pneumoconiosis based upon the evidence of record considered as a whole.

CONCLUSION

On the responsible operator issue, I find that Claimant was not employed by Bledsoe Deep Mining for a full year and therefore the named Employer was not properly named as the responsible operator. The Employer should therefore be dismissed.

Turning to the merits, I find that Claimant has failed to establish pneumoconiosis, which is a necessary element of a claim for benefits under the Black Lung Benefits Act. Accordingly, this claim must be denied and it is unnecessary to address the remaining issues.

ORDER

IT IS HEREBY ORDERED that Bledsoe Deep Mining Co. and the Kentucky Coal Producers' Self Insurance Fund be, and hereby are, **DISMISSED** as parties to this action; and

IT IS FURTHER ORDERED that the claim of Thomas Maggard for black lung benefits under the Act be, and hereby is, **DENIED.**

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.